No. 12388

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST VERNER,

Appellant

VS.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

ALLAN POMEROY
ERNEST R. CLUCK
Attorneys for Appellant
304 Spring Street
Seattle, Wash.

PUBLICATIONS PRESS

No. 12388

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST VERNER,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

ALLAN POMEROY
ERNEST R. CLUCK
Attorneys for Appellant
304 Spring Street
Seattle, Wash.

TABLE OF CONTENTS

TABLE OF STATUTES AND CASES

STATUTES:

CASES:

SUMMARY STATEMENT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging the appellant with knowingly depositing an envelope in the United States Mail addressed to one Milton Fardon of Seattle, Washington, containing a lewd, lascivious and filthy letter in Count I; and in Count II, charging him with similarly depositing an envelope containing a copy of said letter addressed to one Evelyn Nelson of Seattle, Washington, all in violation of Section 1461, Title 18, U. S. C., (U. S. C. A., Title 18, Sec. 334). On the 22nd of July, 1949, the defendant was sentenced to 12 months in a Federal Prison Camp.

JURISDICTION

Violations of the above statute are cognizable only by United States District Courts, which have exclusive jurisdiction of crimes and offenses cognizable under the authority of the United States. The jurisdiction of the Court below was involked under the following statutes:

Section 546, Title 18, U.S.C.A.
Section 41-2, Title 28, U.S.C.A.
Section 371, Title 28, U.S.C.A.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 225, Title 28, U.S.C.A.

STATEMENT OF QUESTIONS RAISED

The charges of the indictment are made under the first paragraph of Section 1461, Title 18, U.S.C., (Title 18, U.S.C.A., sec. 334) which reads as follows:

> "Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, printing, or other publication of an indecent character . . . is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivering, anything declared by this section to be nonmailable, or shall knowingly take or cause the same to be taken from the mails for the purpose of circulating or disposing thereof, or of aiding the circulation or disposition thereof, shall be fined not more than $5,000.00 or imprisoned not more than five years or both."

1. The first question raised on this appeal is this: Did the mailing of the letter (R. pp. 8 and 73-5) to the named addressees constitute a violation of the above statute and was the District Court in error in overruling the defendant's timely motion for dismissal of the indictment (R. pp. 6), his motion for a directed verdict for acquittal (R. pp. 78-9, 84), and his motion for judgment of acquittal and alternative motion for new trial (R. pp 40)?

2. The second question is whether the refusal of the trial Court to admit the testimony of the two recipients of the letters as to the effect the letter had upon them constitutes error and a denial of a fair trial to Appellant, Fardon (R. pp. 79, 92, 119, et seq.), Nelson (R. pp. 116).

SPECIFICATIONS OF ERROR

No. 1: The District Court was in error in overruling the defendant's motion for dismissal of the indictment. (R. p. 6)

No. 2: The District Court was in error in overruling the defendant's motion for a directed verdict of acquittal. (R. p. 84)

No. 3: The District Court was in error in overruling the defendant's motion for judgment of acquittal and alternative motion for a new trial. (R. p. 40)

No. 4: The District Court was in error in sustaining an objection to the following testimony of the witness, Fardon (R. p. 79), to whom the letter was sent:

> Q. When you received this letter, what effect did it produce upon you? State your reactions to the letter.
>
> Mr. Evans: I am going to object to that. That is absolutely immaterial and irrelevant in this case. The only issue involved here is as to whether or not this letter was mailed by the defendant, whether or not it is lewd, lascivious and filthy, and those are the only issues involved.
>
> Mr. Turner: It is evidentiary, bearing on the ultimate issue. I think Mr. Evans is right in stating that if he states it as the ultimate issue.

The Court: The objection is overruled.

Mr. Evans: May I address the court in the absence of the jury? * * * * * *

The Court: The Court is of the opinion that under these two cases cited by the Court, the one in 28 F. and 160 F. under the detailed citation which the Court has given counsel, this objection should be sustained. That will be the order of the Court.

ARGUMENT

SPECIFICATIONS OF ERROR NOS. 1, 2, AND 3

As Specifications of Error Nos. 1, 2 and 3 all deal with question No. 1, as stated above, to-wit: did the mailing of the letter to the above named addressees constitute a violation of the above statute, and challange the sufficiency of the indictment as amended by the evidence, in the interest of time, space and economy, all specifications will be discussed together.

Taken as a whole, the letter conveys to one Milton Fardon the information that the defendant has had illicit relations with one Verne Thornquist, an acquaintance of Mr. Fardon, and warns him of the designs that might be worked upon him. (R. pp 8-9) Fardon is a 43 year old man; he served as a policeman in the City of New York for twenty years; he was married thirteen years and divorced five years prior to the trial (R. pp. 75 to 79). A copy of the letter was sent to Evelyn Nelson, secretary to the employer of Verne Thornquist. At the time of trial, Evelyn Nelson was married and had been for the two years prior. (R. p. 100) The letters were written during a period when the defendant was under high emotional strain caused by the activities of Verne Thornquist seeking to effect an estrangement between the defendant and his wife, as explained by the defendant (R. pp. 180 et seq.) and the defendant's wife (R. 146 et seq.), which testimony

stands corroborated (R. p. 158) and otherwise undisputed in the record. The defendant and his wife had been married since August 20, 1926, and, except for the temporary estrangement effected by Mrs. Thornquist, had continuously lived together as husband and wife (R. p. 146). The defendant was forty-three years of age at the time of trial, was an accountant and had been employed during most of his working years at the National Bank of Commerce in Seattle (R. p. 180) He was a dependable, trustworthy employee of good character and enjoyed a good reputation. (R. pp. 166 et seq.) (R. pp 140 et seq.)

It is significant that Verne Thornquist did not testify.

Written under emotional stress, certain words taken apart from the entire content of the letter appear on their face to be vulgar and crude. We respectfully contend that, taken as a whole, under the circumstances of this case, contained in a private sealed letter rather than a general publication, the writings did not and in law could not have the effect prohibited by the statute—of depraving and corrupting the morals of the persons into whose hands they were sent.

As stated in *Knowles vs. United States* (8 Circ.) 170 Fed. 409 at page 412:

> "The true test to determine whether a writing comes within the meaning of the statute is whether

its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences and into whose hands it may fall, by arousing or implanting in such minds, obscene, lewd or lascivious thoughts or desires."

The law does not seek or purport to outlaw certain words. There is no word or phrase that cannot be transmitted through the mails if the circumstances justify it, or if the conveyance of such words do not effect the prohibited result. Counsel intends to transmit this brief through the mails, containing the words here at issue; this action is justified by the circumstances. No one would doubt that a similar matter might be submitted through the mails to a doctor, psychiatrist or law enforcement agency without violation of the statute. We submit that it is only when such words are submitted to persons whose minds and morals might be adversely affected, or broadcast in such manner that it would be presumed that the writing would fall into the hands of impressionable persons, that the statute is violated.

In this case the two sealed letters were sent to the two above named persons. There is the highest presumption that a letter deposited in the United States Mail will be received by the addressee and no other. In this case there was no proof, and under the evidence there could be no presumption that the letter had or

could have had any adverse effect upon the morals of the addressees.

In the case of *Swearingen vs. United States*, 161 U. S. 446, 16 S. Ct. 562, 40 L. Ed. 765, the court considered an article contained in a newspaper of general circulation to the effect that a named person was, amongst other things "a mental and physical bastard, a black hearted coward, a liar, perjurer and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Savior. Time and again has he been proven a wilful, malicious and cowardly liar." In reversing the conviction, the Court said:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene, lewd and lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.
>
> "Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

In the case of the *United States vs. Barlow*, D. C. Utah, 1944, 56 Fed. Sup., 795, (appeal dismissed, 65 S. Ct. 25, 323 U. S. 805, the Court considered a publication of general circulation advocating celestial or plural marriage, and the Court said:

> "The Supreme Court passed upon this same statute later in *United States vs. Limehouse* 285 U. S. 424, 52 S. Ct. 412, 76 L. Ed. 843, wherein the defendant was charged with sending out certain filthy letters and writings through the mails, containing charges of sexual immorality and miscegenation and similar practices. The court found the language was coarse, vulgar and unquestionably filthy within the popular meaning of that term, and following the Swearingen case, supra, held that in order to constitute a crime the language must be "calculated to corrupt and debauch the minds and morals of those into whose hands it might fall.
>
> In *McKnight v. United States*, (9 Cir.) 78 Fed. 2d, 931, it was held (syl. 2) 'The court in considering indictments under the statute prohibiting mailing of libelous and indecent matter must first determine as a matter of law whether writing complained of could by any reasonable judgment be held to come within prohibition of the law, and the statute, being penal must be strictly construed.'
>
> "In conclusion, it might be said that the natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts."

It was not proved that the act charged in the indictment came within the ban of the statute.

There is no allegation and no proof was offered to

show that the letter was of such a character as to corrupt the morals of the addressees—the only persons who might receive the letters.

The Courts have recognized that certain publications or writings, if published only to selected persons, would have no tendency to deprave or corrupt, but if distributed generally, might fall into the hands of persons who might be corrupted. In the former case, no offense is committed; in the latter, mailing would constitute a violation. It is, therefore, incumbent upon the government to prove that the act charged comes within the ban of the statute. In *U. S. vs. Dennett*, (C.C.A. 2d, 1930), 39 Fed. (2d) 564, in which the charge was based on the mailing of a pamphlet designed for the instruction of children in sex matters, the Court said:

> "In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper."

This case was cited with approval by the 9th Circuit Court of Appeals in *McKnight vs. U. S.* 78 Fed. (2d) 931, 933.

The distinction between printed publications and private sealed letters was clearly pointed out by the

Court in *U. S. vs. Wroblenski* 118 F. 495; the district judge observed:

> "If it were a publication, or a matter were sent to a young person or a stranger, I am not sure that these definitions would exclude the language or suggestion of the letter. But I am of the opinion that the general test is not applicable alike to publications and sealed private letters. In either case the question of violation of the statute rests upon the import and presumed motive, and not upon the mere terms of the communication. Thus its tendency depends upon circumstances, and unexcepitonable language may convey vicious information within the statute . . . In the case of a private sealed letter, there is no publication and no presumption arises of intention to give publicity, or that it will be read by others than the addressee. The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee, and no such tendency can be imputed to this letter to the mother of the defendant.
>
> "The motion to quash the indictment must be sustained accordingly."

In this case there was no showing and it could not be presumed from any showing made that the morals of the two addressees were in any manner effected, certainly not rendered in danger of corruption by the acts of defendant. The charge has not been sustained.

The letter is to be judgment by its effect as a whole.

It is well settled that a document is to be judged

in accordance with its dominant effect, and not merely by isolated words or passages. Thus a document or book when considered as a whole might be perfectly proper, yet contain several words or passages which taken by themselves would be considered indecent or obscene. In such cases, the document or book is characterized by its dominant effect, and not by the isolated words or passages.

U. S. vs. One Book Entitled Ulysses (C.C.A 2d, 1934), 72 Fed. 2d 705, 708

Parmelee vs. U. S., (App. D. C. 1940), 133 Fed. 2d 729

Walker vs. Popenoe (App. D. C.) 149 Fed. 2d, 511, 512.

Taken as a whole, the letter is not within the prohibitions of the statute.

SPECIFICATION NO. 4

It was error for the Trial Court to refuse to admit the testimony of the two addressees, under cross-examination, as to the effect.the letters had upon them.

During cross-examination, the addressee, Fardon, was asked (R. p. 79):

> Q. When you received this letter, what effect did it produce upon you? State your reactions to the letter.

In the absence of the jury, the witness was permitted to answer in order that an offer of proof could be properly made. The testimony was then considered an offer of proof. (R. p. 120)

(Testimony of Milton Fardon.)

> The Court: For the purpose of advising counsel what proof will be available for his offer, the Court permits counsel to make the inquiry and will postpone [62] the ruling of the offer until the offer is made, This is, as I understand it an investigation to see what he will have available for offering. You may answer the question.
>
> The Witness: I don't know—I was deeply surprised, deeply puzzled, perplexed, at receiving a letter from a man whom I had never seen in my life.
>
> Q. It had no other effect on you?
>
> A. Yes, it did have an effect. As a matter of fact,

I thought it was pretty crude of a man to write that kind of a letter about any woman, regardless of the justification, circumstances or anything else, a very poor specimen of a man.

Q. Did it have any other effect?

A. Well, we could go on and on with this. A man who could write a letter like that could be—oh, I guess, subjected to a very lengthy criticism.

Q. So far as you are concerned, you have expressed it—in other words, you thought that you were surprised and puzzled and you felt that it wasn't the sort of letter that a man should write?

A. Definitely not.

Q. And that about summarizes the effect that it had upon you.

A. In a way, yes. [63]

Q. And it had no other effect or different effect?

A. I just don't quite clearly understand that question.

(Testimony of Milton Fardon.)

Q. If it produced any other effect upon you, I want to know what it was.

A. Generally speaking, no.

Following refusal to admit similar testimony of the addressee, Nelson, the following offer of proof was made: (R. p. 116)

> Mr. Turner: I offer to prove by the witness, Evelyn Nelson, that upon receipt of this letter she was shocked and disgusted and felt that the letter was insulting, and that the letter produced no other effect on her.
>
> The Court: Is there any objection?
>
> Mr. Evans: I would object to that proof being presented to the jury, Your Honor, as being irrelevant and immaterial and not part of the issues of this case.
>
> The Court: The Court sustains that objection.

In view of the authorities above cited, we respectfully submit that the defendant was entitled to have this testimony before the jury and that its rejection denied him a fair trial.

Respectfully submitted,

ALLAN POMEROY
ERNEST R. CLUCK
Attorneys for Appellant
304 Spring Street,
Seattle, Wash.